A

Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartal Caddesi Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–2395 OF 2005
ABDUL MALIK ISHAK J
6 MARCH 2006

C *Civil Procedure — Interlocutory proceedings — Multiple applications — Application to remove private caveats filed before application to strike out the former — Which application should be heard first*

D *Land Law — Restraint on dealings — Caveats — Private caveats — Removal — Whether Official Receiver and liquidator was 'body aggrieved' and could apply to court for removal of the private caveats — National Land Code 1965 s 327 — Companies Act 1965 s 236(2)*

E *Land Law — Restraint on dealings — Caveats — Private caveats — Removal — Whether legitimate expectation of shareholder sufficient to amount to caveatable interest — National Land Code 1965 s 323*

F *Land Law — Sale of land — Validity — By liquidator — Whether lands must first vest in the liquidator before sale — Companies Act 1965 ss 233 & 236(2)*

G The applicant was acting as the Official Receiver and Liquidator of Maril-Rionebel (M) Sdn Bhd which had been wound up ('the company in liquidation'). The respondent was a shareholder of the company in liquidation and contested the applicant's application in encl 1. The company in liquidation was the registered proprietor of the five pieces of real estate lands ('the lands'). The respondent had entered five private caveats on the lands. In the exercise of its duties and obligations, H the applicant as the Official Receiver and Liquidator entered into a sale and purchase agreement with a company known as Karisma Saujana Sdn Bhd ('the purchaser') for the disposal of the lands. The presence of the five private caveats on the lands prevented the applicant from fulfilling its obligations under the sale and purchase agreement. The applicant argued that it had the right to remove the private caveats I on the lands. By way of encl 1, the applicant sought for the removal of the private caveats while by way of encl 7, the respondent sought to strike out encl 1. The applicant's counsel suggested that the court should dispose off encl 1 first and then followed by encl 7. On locus standi, it was submitted that the applicant filed encl 1 pursuant to s 327 of the National Land Code 1965 ('the NLC') which allows for 'any person or body aggrieved by the existence of a private caveat' to apply for its

removal. The respondent submitted that since the liquidator/applicant had not complied with the provisions of s 233 of the Companies Act 1965 to vest the property in its name by order of the court, the liquidator/applicant was deprived of any locus standi to make the application in encl 1.

Held, granting encl 1:

(1) Enclosure 1 was filed on 25 October 2005 while encl 7 was filed on 27 January 2006. That by itself entitled this court to hear encl 1 first. Also encl 7 was superfluous because once this court had decided that the private caveats should be removed then the whole matter would come to an end (see para 4).

(2) Section 236(2) of the Companies Act 1965 empowers the liquidator to dispose of the property belonging to a company in liquidation and do all things necessary to ensure that this objective is met. Section 327(1) of the NLC allows the applicant as the Official Receiver and Liquidator and as a 'body aggrieved' to apply to this court for the removal of the private caveats (see para 19).

(3) An expectation no matter how legitimate it may be can never fall within the ambit of s 323(1) of the NLC. In adjudicating encl 1, there was no necessity for the court to look beyond the statutory declaration filed in order to ascertain whether the caveator has made out a sufficient case to prove its caveatable interest. The duty to disclose the relevant facts in order to establish a caveatable interest is rather strict. The caveator cannot simply get away by merely declaring vague notions or some remote equitable claim in the statutory declaration and thereafter hope, against all hope, to justify its equitable claim in their affidavits. The lack of particulars and information in the statutory declaration must surely be held against the caveator (see para 44).

(4) Section 236(2) of the Companies Act 1965 empowers the liquidator like the applicant to dispose of the property belonging to a company in liquidation and do all things necessary to ensure that this very objective is met. Also s 236(2)(a) of the Companies Act 1965 permits the liquidator like the applicant here to 'bring or defend any action or other legal proceeding in the name and on behalf of the company.' In this case, the applicant as the Official Receiver and Liquidator of the company in liquidation had entered into a sale and purchase agreement with the purchaser for sale of the lands and the applicant was bound contractually to deliver the lands to the purchaser free from encumbrances on or before the completion date of 28 February 2006. That would clothe the applicant with the right to deal with the lands pursuant to s 327 of the NLC. Since the private caveats entered by the respondent prevented the applicant from fulfilling its contractual obligations, the applicant must be construed as a 'body aggrieved' in order to entitle it to remove the private caveats. Therefore, the applicant had the locus standi to file encl 1 (see para 59).

(5) It was wrong to say that before the liquidator can sell the lands, the lands must first vest in the liquidator under s 233 of the Companies Act 1965. It would be pointless to have s 236(2) of the Companies Act 1965 as enacted by Parliament if this court could not give effect to it. The qualified powers of a liquidator are deliberately provided for under s 236(1) of the Companies Act

1965. The powers provided for under s 236(2) (a) or s 236(2)(c) of the Companies Act 1965 are not in any way curtailed by s 233 of the same Act (see para 70).

[Bahasa Malaysia summary

Pemohon bertindak sebagai Penerima dan Penyelesai Rasmi Maril-Rionebel (M) Sdn Bhd yang telah digulungkan ('syarikat dalam likuidasi'). Responden merupakan syarikat pemegang saham dalam likuidasi dan menentang permohonan pemohon dalam lampiran 1. Syarikat dalam likuidasi itu merupakan tuanpunya berdaftar lima keeping tanah harta tanah ('tanah tersebut'). Responden telah memasuki lima kaveat persendirian ke atas tanah tersebut. Dalam melaksanakan kewajipan dan tanggungjawabnya, pemohon sebagai Penerima dan Penyelesai Rasmi telah memasuki satu perjanjian jualbeli dengan sebuah syarikat dikenali sebagai Karisma Saujana Sdn Bhd ('pembeli') untuk menjual tanah tersebut. Kehadiran lima kaveat persendirian atas tanah tersebut menghalang pemohon daripada memenuhi tanggungjawabnya di bawah perjanjian jualbelinya. Pemohon bersetuju bahawa ia mempunyai hak untuk membatalkan kaveat-kaveat persendirian atas tanah tersebut. Melalui lampiran 1, pemohon telah memohon agar kaveat-kaveat persendirian tersebut dibatalkan sementara melalui lampiran 7, responden memohon untuk membatalkan lampiran 1. Peguam pemohon mencadangkan agar mahkamah membatalkan lampiran 1 dan kemudian diikuti oleh lampiran 7. Berhubung locus standi, ia dihujahkan bahawa pemohon-telah memfailkan lampiran 1 menurut s 327 Kanun Tanah Negara 1965 ('Kanun tersebut') yang membenarkan 'any person or body aggrieved by the existence of a private caveat' memohon pembatalannya. Responden berhujah bahawa memandangkan penyelesai/pemohon tidak mematuhi peruntukan s 233 Akta Syarikat 1965 untuk meletakkan hartanah itu dalam namanya atas perintah mahkamah, penyelesai/pemohon terkilan akan apa-apa locus standi untuk membuat permohonan dalam lampiran 1.

Diputuskan, membenarkan lampiran 1:

(1) Lampiran 1 telah difailkan pada 25 Oktober 2005 manakala lampiran 7 telah difailkan pada 27 Januari 2006. Itu dengan sendirinya melayakkan mahkamah ini mendengar lampiran 1 dahulu (lihat perenggan). Lampiran 7 juga tidak diperlukan kerana setelah mahkamah ini memutuskan bahawa kaveat-kaveat persendirian tersebut patut dibatalkan maka keseluruhan perkara akan berakhir (lihat perenggan 4).

(2) Seksyen 236(2) Akta Syarikat 1965 memberi kuasa kepada penyelesai untuk menjual hartanah yang dimiliki oleh syarikat dalam likuidasi dan membuat semua perkara yang perlu untuk memastikan bahawa objektif ini tercapai. Seksyen 327(1) KTN membenarkan pemohon sebagai Penerima dan Penyelesai Rasmi dan sebagai 'body aggrieved' untuk memohon ke mahkamah ini untuk membatalkan kaveat-kaveat persendirian tersebut (lihat perenggan 19).

(3) Jangkaan bagaimana sahpun ianya tidak akan terangkum dalam skop s 323(1) KTN. Dalam mengadili lampiran 1, tiada keperluan untuk mahkamah melihat

melebihi deklarasi statutori yang telah difailkan bagi tujuan memastikan sama ada pengkaveat telah mengemukakan kes yang memadai untuk membuktikan ia mempunyai kepentingan dalam kaveat itu. Tanggungjawab untuk mendedahkan fakta-fakta relevan bagi tujuan membuktikan kepentingan dalam kaveat agak ketat. Pengkaveat tidak boleh sewenang-wenangnya terlepas dengan hanya menyatakan tanggapan kabur atau tuntutan ekuiti yang tiada kaitan dalam deklarasi statutori dan berikutan itu mengharapkan, untuk menjustifikasikan tuntutan ekuitinya dalam afidavitnya. Kekurangan butir-butir dan maklumat dalam deklarasi statutori adalah disebabkan oleh pengkaveat (lihat perenggan 44).

(4) Seksyen 236(2) Akta Syarikat 1965 memberi kuasa kepada penyelesai seperti pemohon untuk menjual hartanah yang dimiliki oleh sebuah syarikat dalam likuidasi dan membuat semua perkara untuk memastikan objektif ini tercapai. Seksyen 236(2)(a) Syarikat 1965 juga membenarkan penyelesai seperti pemohon di sini untuk 'to bring or defend any action or other legal proceeding in the name and on behalf of the company.' Dalam kes ini, pemohon sebagai Penerima dan Penyelesai Rasmi syarikat dalam likuidasi telah memasuki satu perjanjian jualbeli dengan pembeli untuk jualan tanah tersebut dan pemohon terikat secara kontraktual untuk menyerahkan tanah tersebut kepada pembeli bebas daripada sekatan pada atau sebelum tarikh siap pada 28 Februari 2006. Ini akan melindungi pemohon dengan hak untuk mengendalikan tanah tersebut menurut s 327 KTN. Memandangkan kaveat-kaveat persendirian yang dimasuki oleh responden menghalang pemohon daripada memenuhi tanggungjawab kontraktualnya, pemohon hendaklah ditafsirkan sebagai satu 'body aggrieved' bagi tujuan memberinya hak untuk membatalkan kaveat-kaveat persendirian tersebut. Oleh itu, pemohon mempunyai locus standi untuk memfailkan lampiran 1 (lihat perenggan 59).

(5) Adalah salah untuk mengatakan bahawa sebelum Penyelesai boleh menjual tanah tersebut, tanah tersebut hendaklah terlebih dahulu terletak pada Penyelesai di bawah s 233 Akta Syarikat 1965. Adalah tidak berasas untuk mempunyai s 233 Akta Syarikat 1965 seperti yang digubal oleh Parlimen jika mahkamah ini tidak dapat menggunakannya. Kuasa-kuasa Penyelesai yang layak diperuntukkan di bawah s 236(1) Akta Syarikat 1965. Kuasa-kuasa tersebut yang diperuntukkan di bawah s 236(2) atau s 236(2)(c) Akta Syarikat 1965 tidak dalam apa cara dibatasi oleh s 233 Akta yang sama (lihat perenggan 70).]

Notes

For cases on caveats, 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3192–3498, 3520–3532.

For cases on interlocutory proceedings generally, 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3287–3290.

Cases referred to

AKB Airconditioning & Electrical Sdn Bhd v Hew Foo Onn & Anor [2002] 5 MLJ 391 (refd)

Anafartalar Caddesi Sdn Bhd (formerly known as Perdana Merchant Bankers Bhd) v Southern Investment Bank Bhd [2003] 1 MLJ 561 (refd)

Ayerst v C & K (Construction) Ltd (1976) AC 167 (refd)
Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor [1993] 1 MLJ 119 (refd)
Borlase v Morris (1985) 2 NZLR 646 (refd)
Chia See Yin & Ors v Yeoh Kooi Imm [1996] 2 MLJ 494 (refd)
Dick's Caveat, Re (1985) 2 NZLR 641 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Gas Lighting Improvement Co Ltd v IRC [1923] AC 723 (refd)
Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 6 (refd)
Hadoplane Pty Ltd v Edward Rushton Pty Ltd (1996) 1 Qd R 156 (refd)
Hew Sook Ying v Hiw Tin Hee @ Hew Hee [1992] 2 MLJ 189 (refd)
Holmes v Australasian Holdings Ltd (1988) 2 NZLR 303 (refd)
Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor [1999] 4 MLJ 262 (refd)
Leather v Church of Nazarene (1984) 1 NZLR 544 (refd)
Lee v Lee's Air Farming [1961] AC 12 (refd)
Macaura v Northern Assurance Co Ltd [1925] AC 619 (refd)
Magic Aus Pty Ltd (in liq), Re (1992) 7 ACSR 742 (refd)
Maiko Woods Maritime & Properties Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd [1998] 4 MLJ 395 (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187 (refd)
N Vangedaselam v Mahadevan & Anor [1976] 2 MLJ 161 (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145 (refd)
Natsafe (M) Sdn Bhd v Loi Teak Kuong [2005] 6 MLJ 454 (refd)
Nominal Insurer v Thomas (1995) 122 FLR 186 (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (refd)
Salomon v A Salomon & Co Ltd (1897) AC 22 (refd)
Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor [1995] 1 AMR 139 (refd)
Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang [2002] 2 MLJ 439 (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (refd)
Tee Chin Yong v Ernest Jeff [1963] MLJ 118 (refd)
Walker v Wimborne (1976) 137 CLR 1 (refd)

Legislation referred to

Companies Act 1965 ss 4, 208, 230, 233, 236, 264
National Land Code 1965 ss 236, 256, 323, 324, 327, 328, 329

Dato' Ahmad Redza Abdullah (Wan Azmir bin Wan Majid with him) (Sharizat Rashid & Lee) for the applicant.
Dato' Bastian Pius Verdargon (Vendargon & Partners) for the respondent.
Lee Wooi Mien (Shook Lin & Bok) holding a watching brief for OCBC Bank (the chargee bank).

Abdul Malik Ishak J:

Preliminary issue

[1] There are two enclosures before me for adjudication. One is encl 1 and the other is encl 7. The applicant's counsel suggested that I should dispose off encl 1 first and then followed by encl 7. The respondent's counsel suggested the reverse and he implored me to hear encl 7 first and then followed by encl 1.

[2] By way of encl 1, the applicant seeks for the removal of the private caveats on the five pieces of prime real estate lands and the prayers which the applicant seeks may be stated in this way:

(a) That pursuant to *s 327* of the National Land Code 1965 (hereinafter referred to as the 'NLC'), this Honourable Court shall direct or order the Registrar of Titles, Wilayah Persekutuan to remove the five private caveats bearing presentation Number 17686/2004 on the lands held and described as Hakmilik Geran 26939, No lot 33, Seksyen 63; Hakmilik Geran 27040, No lot 41, Seksyen 63; Hakmilik Geran 36513, No lot 157, Seksyen 63; Hakmilik Geran 26695, No lot 221, Seksyen 63; and Hakmilik Geran 26694, No lot 222, Seksyen 63, all of which are held in the city of Kuala Lumpur, Federal Territory which were entered by the respondent on the 27 December 2004 (collectively referred to as 'the said lands').

(b) That pursuant to *s 329* of the NLC, that the respondent do pay damages to the applicant herein for the wrongful entry of private caveats and such damages are to be assessed by the Senior Assistant Registrar in due course.

(c) That the respondent be restrained from further entering private caveats on the said lands.

(d) That costs be paid by the respondent.

(e) Further and other relief or remedy that this Honourable Court shall deem fit and just.

[3] And by way of encl 7, the respondent seeks to strike out encl 1 or seeks to stay encl 1 pending the happening of certain events. To be precise, by way of encl 7, the respondent seeks the following prayers:

1 That these proceedings be struck off or, alternatively, that these proceedings be stayed pending:

1.1 determination of the complaint to the Minister dated 18 December 2004 pursuant to s 230 of the Companies Act 1965; and/or,

1.2 determination of the summons in chambers dated 27 July 2005 filed in the Kuala Lumpur High Court bearing code No D4–28–39–1994 (the winding-up court) inclusive of all proceedings (appellate or otherwise) in respect of all such matters in relation thereto.

2. Such other orders and reliefs as this Honourable Court shall deem fit.

3. Costs.

[4] In point of time, encl 1 was filed earlier than encl 7. Enclosure 1 was filed on 25 October 2005 while encl 7 was filed on 27 January 2006. That by itself entitles this court to hear encl 1 first. The respondent's counsel rightly said that if encl 1 is granted then encl 7 would die a natural death. Another point that should be highlighted is this. That the respondent is not seeking to stay the order to remove the private caveats, if granted, but in fact purports to stay the proceedings even prior to the hearing of the applicant's originating summons in encl 1. In short, what the respondent is attempting to do is to deny or pre-empt this court from hearing the merits and the demerits of the applicant's application to remove the private caveats entered on the said lands. It can also be said that encl 7 is superfluous because once this court has decided that the private caveats should be removed then the whole matter would come to an end. For these varied reasons, I proceed to hear encl 1 first.

NOMENCLATURE

[5] The applicant is acting as the Official Receiver and Liquidator of Maril-Rionebel (M) Sdn Bhd, formerly known as Kredin Sdn Bhd, in liquidation (Company No 076086-A). By an order of the court dated 14 November 2000, Maril-Rionebel (M) Sdn Bhd was wound up under a winding up petition No D4–28–39 of 1994 at the Kuala Lumpur High Court. Hereinafter, Maril-Rionebel (M) Sdn Bhd shall be referred to as 'the company in liquidation'.

[6] The respondent, Anafartalar Caddesi Sdn Bhd is a shareholder of the company in liquidation and it is contesting the applicant's application in encl 1.

THE FACTS AND THE LAW

[7] The company in liquidation is the registered proprietor of the five pieces of real estate lands referred to as the said lands in prayer (a) of encl 1. From the bar, counsel on both sides informed the court that the said lands are very prime and strategically located facing the Kuala Lumpur City Centre ('KLCC') and along the same stretch with the Permodalan Nasional Berhad ('PNB') hotel known as Darby Park. No wonder everyone seems to be interested in the said lands and it is now the subject matter of the present originating summons.

[8] The respondent entered five private caveats on the said lands on 23 December 2004 via presentation number 17686/2004 and these five private caveats were registered on 27 December 2004. The reasons and grounds in support of the respondent's application to enter the five private caveats are found in a statutory declaration affirmed by Abdul Latiff bin Mohd Ismail dated 23 December 2004 and a copy of that statutory declaration can be seen in exh 'MR-5' annexed to the applicant's affidavit in encl 2. I shall refer to the statutory declaration at the later part of this judgment.

[9] In the exercise of its duties and obligations, the applicant as the Official Receiver and Liquidator entered into a sale and purchase agreement dated 30 August 2005 with a company known as Karisma Saujana Sdn Bhd ('the purchaser') for the disposal of the said lands for the sum of RM100,100,000 (Ringgit one hundred

million and one hundred thousand only). Under the terms of the sale and purchase agreement, the applicant is contractually obliged to deliver the said lands to the purchaser free of encumbrances not later than six months from the date of the sale and purchase agreement. The completion date for the sale and purchase agreement is on or before 28 February 2006. The presence of the five private caveats on the said lands prevented the applicant from fulfilling its obligations under the sale and purchase agreement. A prompt removal of the five private caveats is certainly called for.

[10] The respondent seeks to raise various historical issues in its affidavits, including matters which have been conclusively decided and adjudicated in the courts prior to these proceedings. It is a known fact that the respondent's continuous and persistent battle to delay all proceedings by the creditor banks has been fully documented in the law journals and, with respect, the respondent seems to employ the same familiar tactics, time and again. In my judgment, these proceedings should be confined within the parameters of whether or not the private caveats in question comply with the requirements laid down in s 323 of the National Land Code 1965. That section enacts as follows:

323 Applications for entry of private caveats.

(1) The persons and bodies at whose instance a private caveat may be entered are —

(a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (*b*).

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of section 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or an undivided share in the land or a particular interest only.

(3) Any application under this section shall be accompanied by —

(a) the prescribed fee;

(b) the grounds giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and

(c) if relating to a part of the land, a description or a plan of the land affected, and if relating to an undivided share in the land or a part thereof, a description, which is sufficient for identification.

[Am. Act A587, Act A1104.]

This would be followed by s 324 of the NLC and it enacts as follows:

Procedure on applications

324. (1) The Registrar shall note on any application under section 323 the time at which it was received (being, in the case of any application sent by post, the time at which it was withdrawn from its cover in the Registry or, as the case may be, Land Office) and,

A subject to subsection 329(2), shall as soon as may be thereafter (and without being concerned to enquire into the validity of the claim on which it is based) give effect thereto by entering the caveat applied for in the manner provided by subsection (2).

(2) The entry of any private caveat shall be effected by the endorsement on the register document of title, under the hand and seal of the Registrar, of the words 'Private Caveat', together with a statement specifying —

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(a) whether the caveat binds the land itself, or an undivided share in the land or a particular interest therein only;

(b) the person or body on whose application it was entered;

(c) the time from which it is effective (being the time of receipt of the application, as noted thereon pursuant to subsection (1)); and

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(d) the reference under which the application is filed.

(3) As soon as may be after the entry of any such caveat, the Registrar shall serve a notification in Form 19A upon the proprietor of the land or an undivided share in the land bound thereby or, in the case of a caveat binding a particular interest only, upon the person or body in whom that interest is for the time being vested.

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[*Am. Act A1104*.]

[11] Speaking generally, a caveat gives notice on the register document of title to the whole world at large of the existing interests or claims of the caveator in the land. A caveat is always equated and is akin to an injunction. It must be borne in mind that a caveat is not an instrument of dealing and it does not create an interest in the land. There are four types of caveats as set out in the NLC. They may be stated as follows:

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(1) Registrar's caveat;

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(2) private caveat;

(3) lien-holder's caveat; and

(4) trust caveat.

Of the four, the most popular is the private caveat. Section 323 of the NLC as reproduced earlier sets out the categories of persons who may enter private caveats. It is salutary to remember that not every person can enter a private caveat. Only a person who has a caveatable interest in the land may enter a private caveat. Thus, a person who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest. Under s 324(1) of the NLC, on receipt of an application to enter a private caveat, the Registrar is not supposed to enquire into the validity of the claims on which an application for an entry is made. Rather, the Registrar's duty in the context of s 324(1) of the NLC is purely administrative or ministerial (*N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161; *Tee Chin Yong v Ernest Jeff* [1963] MLJ 118 at p 119; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 at p 230; and *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267 at p 270). To put it differently, the Registrar cannot question the merits or validity of the private caveat. And no undertaking in damages is required as a pre-condition of the right of the caveator to lodge a private caveat. The New Zealand Courts, however, are suggesting that on an application for an extension of the private caveat (the life span of a private caveat being six years under our NLC), the court may insist that the caveator give an undertaking as to damages (*Leather v*

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Church of Nazarene (1984) 1 NZLR 544; *Borlase v Morris* (1985) 2 NZLR 646; and *Re Dick's Caveat* (1985) 2 NZLR 641) and this is purely a matter of discretion (*Holmes v Australasian Holdings Ltd* (1988) 2 NZLR 303) and this is done purely to prevent a recalcitrant caveator from lodging the private caveat on the same piece of land, again and again. That would be the New Zealand approach. Here, in Malaysia, fortunately there is s 329 of the NLC which gives the power to the court to award damages where it is found that the private caveat was wrongfully lodged. In awarding damages, the court is actually awarding 'compensation to any person or body who suffers any damage or loss' (see s 329(1) of the NLC). A private caveat is an inexpensive method of protecting one's alleged and proved rights in the land. It constitutes a warning or a caution to others who want to stake a claim to the land. The caveator needs only to fill up the caveat form in Form 19B of the NLC together with a statutory declaration verifying the claim in accordance with sections 323(2) and 323(3) of the NLC and the Registrar shall then enter the private caveat accordingly. It is as simple as that. It is too simplistic that it can give rise to an abuse as demonstrated in the present case at hand. It is the function of the High Court to adjudicate on the validity of the private caveat and the decision of the High Court is appealable to the Court of Appeal.

[12] By virtue of s 324(2) of the NLC, the entry of any private caveat shall take immediate effect from the time of receipt of the application by the Registrar endorsing on the document of title under his hand and seal, the words 'Private Caveat', together with a statement specifying —

(a) whether the caveat binds the land itself or an undivided share in the land or a particular interest therein only;

(b) the person or body on whose application it was entered;

(c) the time from which it is effective (being the time of receipt of the application, as noted thereon pursuant to subsection (1)); and

(d) the reference under which the application is filed.

And under s 324(3) of the NLC, after the entry of the private caveat, the Registrar shall serve a notification in Form 19A upon the proprietor of the land or to the person whose undivided share is affected or to the chargee.

[13] The effect of a private caveat is certainly debilitating. It prohibits any dealing in the land. Section 322(3) of the NLC states that a private caveat prohibits registration, endorsement or entry on the register document of title of —

(a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto);

(b) any claim to the benefit of any tenancy exempt from registration granted directly thereout; and

(c) any lien-holder's caveat in respect thereof.

Thus, it can be seen that the existence of the private caveat on the land is quite overwhelming. Lord Diplock speaking for the Privy Council puts it rather well in the case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212, at p 214:

A The system of private caveats is substituted for the equitable doctrine of notice in English land law. By s 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By s 324 the Registrar is required to act in an B administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.

C The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by D the caveator but not yet proved.

[14] In the context of the present case, the crucial question to pose is this. Has the respondent a caveatable interest in the said lands?

E THE RIGHT TO REMOVE THE PRIVATE CAVEATS

[15] The applicant argues that it has the right to remove the private caveats on the said lands. The respondent argues to the contrary.

F **[16]** It must be recalled that Maril-Rionebel (M) Sdn Bhd has been wound up. Flowing from that, it must be emphasised that liquidation or winding up, according to *Re Magic Aus Pty Ltd (in liq)* (1992) 7 ACSR 742; and *Nominal Insurer v Thomas* (1995) 122 FLR 186, is nothing more than a process whereby the assets of a company are collected and realised and the resulting proceeds are then applied in discharging all its debts and liabilities and that any balance which remains after G paying the costs and expenses of winding-up is then distributed among the members according, of course, to their rights and interests or otherwise it will be dealt with according to what the constitution of the company has to say. It is certainly ideal to read the decision of the House of Lords in *Ayerst v C & K (Construction) Ltd* (1976) AC 167 in regard to the discussion as to the nature of liquidation.

H **[17]** Winding up is an ugly episode. It brings to an end the life of a company. The aim of winding-up a solvent company is usually to allow the shareholders, who decide that the company has fulfilled the purposes for which it was first established, to have the assets distributed equally among themselves after paying out the creditors. If a company is insolvent, the purpose of winding it up is to provide I a procedure which allows for an equitable and fair distribution of the assets of the insolvent company amongst its creditors on a pari passu basis.

[18] A book entitled *Principles of Company Law In Malaysia* by Shanthy Rachagan, Janine Pascoe and Anil Joshi carries the following write ups (see p 692):

> Because the purpose of a winding up is to distribute the company's assets to creditors and contributories, the liquidator is under a duty to realise the company's assets. To this end, the liquidator is given powers to sell all the company's property and to execute documents in its name: s 236.

[19] The powers referred to by the learned authors in that book are found in s 236(2) of the Companies Act 1965. That section empowers the liquidator to dispose of the property belonging to a company in liquidation and do all things necessary to ensure that this objective is met. Section 236(2)(a) of the Companies Act 1965 even permits the liquidator to bring or 'defend any action or other legal proceeding in the name and on behalf of the company.' Here, as I said, the applicant as the Official Receiver and Liquidator has entered into a sale and purchase agreement with the purchaser for the disposal of the said lands and the applicant is now contractually bound to deliver the said lands to the purchaser free of encumbrances on or before the completion date of 28 February 2006. And it is obvious that the private caveats entered by the respondent stands squarely in the way of allowing the applicant to fulfill its contractual obligations. Section 327(1) of the NLC allows the applicant as the Official Receiver and Liquidator and as a 'bodyaggrieved' to apply to this court for the removal of the private caveats.

THE STATUTORY DECLARATION

[20] The NLC does not provide for any safeguard against the abuse of the caveat system at the point when a caveat is first applied for. Once an application is in accordance with the proper form and is duly signed, attested and verified by the statutory declaration of the applicant or his advocate and solicitor, and accompanied by the payment of the appropriate fee, the Registrar has no choice but must accept and enter the caveat applied for by the applicant. It is because of the easy manner of applying for a caveat that an abuse may take place. Thus, a delinquent caveator may enter a caveat on any land or property in order to cause a nuisance or even to delay the conveyance or transfer or sale of any land or property. The applicant says that the respondent is a delinquent caveator who lodges the caveat at will. In *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 6, I did say at pp 19–20 of the report that:

> … under s 324 of the NLC the Registrar acts in a purely administrative capacity in registering caveats and is not concerned with the validity or propriety of the claims on which the caveat purports to be based.

It can be surmised therefore that registered proprietors are left at the mercy of recalcitrant caveators. It seems that the only semblance of some kind of safeguard against the abuse of the caveat system lies in the insistence as shown in ss 323(2) and 323(3)(b) of the NLC of the need for the caveator to verify the grounds giving rise to his claim by way of a statutory declaration. It is therefore incumbent on this court to examine the statutory declaration as found in exh 'MR-5' of encl 2. It is urged upon me to adopt a very strict approach when examining the veracity of the caveator's claim. Needless to say the private caveats here will effectively operate as an injunction to prohibit any dealings with the said lands. To confound the matter

further, a private caveat is said to be akin to an ex parte injunction which unless removed by the court order will last for six long lingering years as set out in s 328 of the NLC which is worded as follows:

> Lapse of private caveats
>
> 328. (1) A private caveat shall, if not sooner withdrawn under section 325 or lapsing pursuant to subsection 326(1B) or removed by the Registrar pursuant to an order of the Court under section 327, lapse at the expiry of six years from the time from which it took effect, and the entry thereof may be cancelled accordingly by the Registrar, either of his own motion or on an application in that behalf by any interested person or body.
>
> (2) Every cancellation under subsection (1) shall be signed and sealed.
>
> [Am. Act A832.]

Then there is s 327 of the NLC which enacts as follows:

> Removal of private caveats by the Court
>
> 327. (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte)* may make such order on the application as it may think just.
>
> (2) The Registrar shall, on being duly served with an order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.
>
> (3) Every cancellation under subsection (2) shall be signed and sealed.
>
> [*Am. Act A587, A615.*]

[21] The stand of the applicant is this. That the respondent is a habitual delinquent caveator and this court must be wary of it.

[22] It is now opportune to examine the statutory declaration which contains the following averments:

(1) that the deponent by the name of Abdul Latiff bin Mohd Ismail is a director of the respondent's company;

(2) that Overseas Chinese Banking Corporation's (OCBC's) charge on the said lands is unenforceable;

(3) that the sale of the said lands is illegal, ultra vires, etc;

(4) that relevant steps are in the course of being taken by the respondent to prevent the sale;

(5) that the respondent as a contributory has a legitimate expectation to prevent any unlawful sale; and

(6) that no sum is due to any person or, in other words, the company in liquidation is debt free.

[23] The applicant argues that the statutory declaration does not disclose a caveatable interest or a claim to a caveatable interest in the said lands. The respondent argues to the contrary.

[24] It its original text, the statutory declaration is worded as follows (see exh 'MR-5' of encl 2):

IN THE MATTER OF THE REGISTRATION OF A CAVEAT

UNDER SECTION 323 OF THE NATIONAL LAND CODE

STATUTORY DECLARATION

I, ABDUL LATIFF BIN MOHD ISMAIL (NRIC No 540117–07–5135) of No 254-C, East Jelutong, 11600 Penang, am a Director of Anafartalar Caddesi Sdn Bhd ('Anafartalar'), a company incorporated in Malaysia and having its registered office at No 63, Jesselton Road, 10450 Penang and am duly authorised on behalf of the said Anafartalar Caddesi Sdn. Bhd. do solemnly and sincerely declare as follows:

1 Anafartalar is a contributory of Maril-Rionebel (M) Sdn. Bhd. (formerly known as Kredin Sdn. Bhd. (in liquidation) ('Kredin').

2 Kredin is the registered proprietor of Lots 33, 41, 157, 221 and 222 all of Section 63, Town of Kuala Lumpur, Wilayah Persekutuan ('5 lots').

3 I am advised by my solicitors and state that the 5 lots are subject of an unenforceable Charge dated 31 May 1982 (Presentation No: 13948/82 Jilid 266 Folio 121) in favour of OCBC Bank (M) Berhad.

4 The Director General (of) Insolvency has intimated that it wants to decide to sell the 5 lots after acting illegally, ultra vires and unconstitutionally and/or in concert with OCBC Bank (M) Berhad, Southern Investment Bank Berhad and Bumiputra-Commerce Bank Berhad (and in conjunction with its more than 95% Principal, Commerce Asset-Holding Sdn. Bhd.).

5 The relevant steps are in the course of being taken by Anafartalar to prevent any sale of the 5 lots.

6 Any disposal of the '5 lots' by the unlawful actions ought to be prohibited to avoid any issue of bona fide purchaser for value, indefeasibility issue to arise, and permit depletion of the Estate of Kredin in Winding-Up pending due determination.

7 Kredin in liquidation in the circumstances is helpless in the interim to prevent wrongful and illegal ultra vires and unconstitutional disposal of the properties in respect of which Anafartalar as a Contributory has a legal and legitimate expectation to prevent any unlawful disposal.

8 Kredin and Anafartalar have always maintained no sum is due to any person and is prepared to establish its position.

9 In the premises, (I) humbly enter this Caveat.

And I make this solemn declaration conscientiously believing the same to be true by virtue of the provisions of the Statutory Declaration Act 1960.

Subscribed and solemnly declared by)

ABDUL LATIFF BIN MOHD ISMAIL)

at KL in the State of Wilayah Persekutuan) Sgd.

this 23rd day of December 2004)

Before me,

Sgd.

Commissioner for Oaths.

IS ABDUL LATIFF BIN MOHD ISMAIL A DIRECTOR OF THE RESPONDENT'S COMPANY?

[25] The company searches which have been exhibited in both the applicant's affidavits do not reveal that Abdul Latiff bin Mohd Ismail is a director of the respondent's company although he declares that it is so in the preamble to the statutory declaration. The latest search conducted on 7 February 2006 and exhibited as exh 'MR-7' to the applicant's further affidavit in encl 10 confirms this very fact.

[26] In the respondent's reply as seen in exh 'AL-13' of encl 5A styled as Jilid II at p 532, the respondent has only produced the statutory declaration declaring his solvency and qualification to be a director. But there is no proof that he has been appointed as such as should be the case and if so it should be verified in the usual Forms 49 and 50 of the NLC. This issue is hotly contested by the applicant yet the respondent fails to advance any cogent proof thereto. This issue should be decided in favour of the applicant and based on this issue alone the entire statutory declaration should be invalidated.

IS OCBC'S CHARGE ON THE SAID LANDS UNENFORCEABLE?

[27] Now, para 3 of the statutory declaration contains an averment that the charge in favour of OCBC bank is an 'unenforceable charge'. This averment seems to suggest that the charge is at least subject to legal challenge or yet to be determined by a court of law. The applicant argues that this averment is untrue and misleading. According to the applicant, in order to verify whether or not the order for sale or the charge was still the subject of an outstanding litigation, the applicant had written to Messrs Shook Lin & Bok, the OCBC's lawyers, seeking clarification thereto (see the applicant's letter dated 8 February 2006 as exhibited in exh 'MR-9' of the applicant's further affidavit in encl 10). Messrs Shook Lin & Bok has graciously replied by way of a letter dated 10 February 2006 and a copy of which is exhibited as 'MR-10' of the applicant's further affidavit in encl 10. In summary, Messrs Shook Lin & Bok has informed the applicant that the foreclosure proceedings was challenged all the way to the then Supreme Court until such time as the appeal was withdrawn and struck out on 7 March 1998.

[28] There was a typographical error in that one title was not included and so an amendment was sought in the order for sale under the slip rule. The amendment was allowed and no appeal was made. Eleven years later the amendment was challenged by way of a summons in chambers dated 24 August 2000. Again, an appeal was lodged and the High Court dismissed the appeal after hearing full submissions by the parties. Subsequently, a further appeal was struck off by the Court of Appeal on

26 August 2004. Various applications for stay were applied for until the issue of the stay order was finally disposed of under Civil Appeal No W–03–24 of 2003.

[29] It is now beyond any doubt that after almost 17 years of challenging the charge in every conceivable manner and running through the entire appellate process of our fair judicial system, the legality of the OCBC's charge on the said lands must surely be no longer an outstanding issue. In my judgment, the statutory declaration is nothing more than a conscious and deliberate misstatement of fact made under oath. In other jurisdictions, the deponent of a false statutory declaration may find himself charged in the criminal court.

THE SALE OF THE SAID LANDS IS ILLEGAL, ULTRA VIRES, ETC

[30] Paragraph 4 of the statutory declaration makes fleeting allegation against the applicant that by selling the said lands it has acted 'illegally, ultra vires, unconstitutionally and/or in concert' with the creditor banks. It is now trite that the law recognises the liquidator's right to sell the property of the company in liquidation. In winding up, the liquidator occupies the central position and he is often a qualified accountant who specialises in liquidation and has the knowledge and experience necessary to perform the responsible, and often difficult duties involved. Once the liquidator is appointed, the powers of the directors cease and the liquidator assumes the general function of managing the company and of collecting, realising and distributing its assets. Just like a director, the liquidator acts as the agent of the company and stands in a fiduciary relationship with the company and possesses a considerable measure of discretion in performing various functions. The powers and duties of the liquidator are, for the most part, statutorily defined. Unlike a director, the liquidator acts at all times subject to the direction and with the assistance of the court. The liquidator is encouraged to use his commonsense and to seek the assistance of the court, by way of an application, for directions in cases of doubt or difficulty. However, discretion and commonsense must prevail and it must be freely and frequently exercised by the liquidator.

[31] Now, in the context of the present case, the stand of the applicant is this. That, at all times, the liquidator had acted fairly and equitably when disposing off the said lands. In order to ascertain the value of the said lands the applicant had employed the services of the 'Jabatan Penilaian dan Perkhidmatan Harta Wilayah Persekutuan' who have in turn valued the said lands collectively for the sum of RM95,100,000 (Ringgit ninety five million one hundred thousand) as at October 2004. It is obvious that the sale price of the said lands to the purchaser exceeds the valuation price by RM5m. It is also germane to mention that despite protracted litigation by the parties, there has never been any finding of illegality or conspiracy as alleged. On this note, I must hold that that part of the statutory declaration is both misleading and inaccurate.

WERE THERE ANY STEPS TAKEN TO PREVENT THE SALE OF THE SAID LANDS?

[32] In paras 5 and 6 of the statutory declaration as per exh 'MR-5' of encl 2, the deponent suggests that as at the time of entering the private caveats on 23 December 2004, relevant steps were in the course of being taken to prevent the sale of the said lands. Is this suggestion really true? With respect, this averment is rather misleading. Allegedly, the respondent has lodged a complaint to the Minister pursuant to s 230 of the Companies Act 1965 since 18 December 2004. This date is well before the sale and purchase agreement executed by the parties on 30 August 2005. Therefore it can hardly be said that the complaint lodged to the Minister was made as an attempt to prevent the sale of the said lands. In actual fact, at that point of time, there was no impending sale.

[33] To bolster up its case, the respondent proceeds to exhibit an unsealed summons in chambers dated 27 July 2005 which seeks to remove the liquidator and/or to file a writ against the bank. But, alas, this summons in chambers was filed prior to the sale of the said lands. That being the case it could not be said that the summons in chambers was also part of the respondent's steps taken to prevent the sale of the said lands. To put it bluntly, paras 5 and 6 of the statutory declaration are totally untrue.

CAN THE PHRASE 'LEGITIMATE EXPECTATION' BE CONSTRUED TO MEAN AN INTEREST IN LAND IN ACCORDANCE WITH SECTION 323(1) OF THE NLC?

[34] The only indication for some vague claim towards an interest in the said lands is found in para 7 of the statutory declaration. Curiously enough, the deponent initially avers that as a contributor, the respondent has a legitimate interest in the said lands but later the deponent proceeds to delete the word 'interest' and substitutes it with the phrase 'legitimate expectation' in an attempt to prevent any unlawful disposal of the said lands. The respondent seeks to describe itself as a contributory which status must invariably arise from its position as a shareholder during the era of the solvency of the company. Section 4 of the Companies Act 1965 defines the word 'contributory' in this way:

> 'contributory', in relation to a company, means a person liable to contribute to the assets of the company in the event of its being wound up, and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory;

It is salutary to remember that the position of a contributory in the context of claiming a caveatable interest in land is no different from that of a shareholder. Whilst a shareholder may claim a right to the dividends, the contributory conversely maybe liable for calls or contributions to a company in liquidation. Seen in this context, I cannot see how this would bring the respondent any closer to establishing a claim to an interest in the said lands.

[35] I will now say something about the separate legal personality of a company. It is trite law that the company and its shareholders are separate legal entities. The sanctity of the legal personality of a limited company has always been preserved and guarded by the courts of law. To say that property belonging to a company would also vest the company's shareholders an interest in the said property would be akin to driving a stake to the very heart of the doctrine of a separate legal entity which has been enshrined in our company law in respect of limited liability companies.

[36] In short, the law treats a company as being a separate person from its members and from those who manage its operations. This is known as the doctrine of separate legal personality. The main characteristic of a company is this. That it is treated as a separate person from its participants. This simply means that the company can incur and receive obligations and hold property in its name. Thus, a company is free to do the following things:

(a) can lend or borrow money;

(b) can enter into contracts with its participants and outsiders such as suppliers and customers;

(c) can be the registered proprietor of a piece of land and can even own chattels (personal property);

(d) can be a lessee or a lessor;

(e) can operate a bank account and take out an insurance coverage;

(f) can act as a trustee of a trust in its own name;

(g) can be the plaintiff or the defendant in civil proceedings; and

(h) can even be the defendant in a criminal proceeding.

[37] The list, however, is not closed. It is difficult to itemise exhaustively as to what a company can do. One thing that is certain is this. That the rights that the company holds and the obligations which the company incurs are entirely that of the company and not those of its managers or the people who have invested in it or its employees. Sumner LJ in *Gas Lighting Improvement Co Ltd v IRC* [1923] AC 723 at pp 740–741, aptly said:

> Between the investor, who participates as a shareholder, and the undertaking carried on, the law imposes another person, real though artificial, the company itself, and the business carried on is the business of the company, and the capital it employs is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham (of which there is no suggestion here), the idea that it is a mere machinery for effecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspects of the facts.

[38] *Salomon v A Salomon & Co Ltd* (1897) AC 22 is a classic case which establishes the principle of the independent legal personality of the company. The facts of that case may be stated as follows. There, Aron Solomon had for some years carried on the business as a leather merchant and boot manufacturer. He was ambitious and he decided to form a limited company to purchase his business, but,

A he wished to retain control over the conduct of the business and so he planned that the shareholders of the company should be restricted to himself and the members of his family. With this background in mind, the company was formed and he and six other members of his family subscribed its memorandum for one share each, and he and two of his sons were appointed the directors of the company. A contract for the
B sale of his business to the company was then entered into. The purchase price was £38,782 and was apportioned amongst the various assets which made up the business so that the price of the assets was the same as their respective values as shown in the balance sheet as prepared by Salomon's accountant save that the price of some of the assets was fixed at figures exceeding their balance sheet value by a total of approximately £8,000. The purchase price was to be paid in cash except for the sum
C of £16,000 which the company might satisfy in cash or by issuing debentures secured by a charge over the assets of the company at its option. The company's nominal capital was £40,000 in £1 share, and except for seven shares issued to the subscribers of the memorandum, the only shares which the company issued were 20,000 to Salomon, which he alleged were fully paid for by the company and retained £20,000
D out of the purchase price for his business. So the business was transferred to the company and it issued debentures for £10,000 to Salomon and paid him £8,782 in cash in satisfaction of the balance of the purchase price. Somehow, the business did not prosper and when the company was wound up a year later its liabilities (including the debenture debt) exceeded its assets by £7,733. The company's liquidator
E representing the unsecured trade creditors of the company claimed that the company's business was in reality still that of Salomon's, the company being merely a sham designed to limit Salomon's liability for debts incurred in carrying on its business, and therefore Salomon should be ordered to indemnify the company against its debts and payment of the debenture debt to him should be postponed until the company's other creditors were satisfied.
F

[39] The trial judge in the person of Vaughan Williams J, agreed with the liquidator. His Lordship held that the subscribers of the memorandum, other than Salomon, held their shares as mere nominees for him, and that Salomon's sole purpose in forming the company was to use it as an agent to run his business for him.
G The Court of Appeal arrived at the same conclusion as that of Vaughan Williams J, but for different reasons. The Court of Appeal held that the Companies Act were intended to confer the privilege of limited liability only on genuine, independent shareholders who had combined their capital to enable an enterprise to be started and not upon a man who was really the sole owner of a business and who merely
H appointed six nominees to join him by going through the rigmarole of incorporating a company in order to continue carrying the business forward.

[40] The House of Lords unanimously reversed the decisions of Vaughan Williams J, and the Court of Appeal. The House of Lords held that Salomon was under no
I liability to the company or its creditors and that his debentures were validly issued and that the security created by them over the company's assets was effective against the company and its other creditors. The House of Lords also established the now famous principle that a company is a legal entity separate from its corporators and that, as a matter of law, the parties thereto are divided by what is now known as the 'corporate veil'. This represents the common law position in many jurisdictions

(*Macaura v Northern Assurance Co Ltd* [1925] AC 619; *Walker v Wimborne* (1976) 137 CLR 1; *Hadoplane Pty Ltd v Edward Rushton Pty Ltd* (1996) 1 Qd R 156; and *Lee v Lee's Air Farming* [1961] AC 12 (PC)). A

[41] The law states that we must treat the company as a separate person from its participants. This means that: B

(1) The company's obligations and liabilities are entirely its own and not those of its participants. Thus, when a company incurs a contractual obligation or a liability in tort, that obligation or liability is that of the company and not of its members or officers. Since the companies are separate entities, the creditors of the company are unable to look to the participants in the company in order to pay the company's debts. C

(2) A company can sue and be sued in its name. Being a separate legal entity, the company may enforce its rights by suing. It can definitely incur liabilities and be sued by other parties (*Vu Siew Chin v Wong Fah Yoon* [1982] 2 MLJ 221 (FC)). In *Foss v Harbottle* (1843) 2 Hare 461 the court held that as a separate person in law, a company must enforce its rights by itself in its own name. D

(3) A company has perpetual succession. It means that the company is a continuing entity in law with its own identity regardless of the changes in its membership. A company continues to be in existence until it is deregistered under the statutory procedure as set out in the Companies Act 1965. Indeed under s 208 of the Companies Act 1965, the Registrar of Companies is empowered to cancel the registration of the company and to also dissolve the company where it has reasonable ground to believe that the company is not carrying on business or is not in operation. E

(4) A company's property is not the property of its participants. By virtue of the separate entity rule, a company may own property distinct from the property of its own members. F

(5) A company can enter into a contract with its controlling participants. This is indeed true. As demonstrated by the case of *Salomon*, a company can lend money to or borrow money from its controlling shareholder. G

[42] At the local scene, there is the case of *Natsafe (M) Sdn Bhd v Loi Teak Kuong* [2005] 6 MLJ 454 that should be referred to. The facts of that case may, briefly, be stated as follows. Arising from a dispute amongst the shareholders, a settlement agreement was executed where one group will end up buying the other group of shareholders. The settlement agreement stipulated that the payment for the share sale price shall be by way of distribution of the company's assets and the balance by way of cash payment. The company suffered financial difficulty and was forced to sell a piece of property on which one unit of a double storey link house stood in order to pay off a creditor bank. One of the shareholders then entered a private caveat on the grounds that he was a shareholder and that the settlement agreement conferred on him rights to the said property. That case was decided by me and in ordering the removal of the private caveat, this was what I said at p 462: H I

> It is trite law that the plaintiff, a limited company incorporated under the Companies Act 1965, and its shareholders are two separate legal entities (*Hew Sook Ying v Hiw Tin Hee*).

> To reiterate, the property is registered in the name of the plaintiff and not the shareholders of the plaintiff. It must be recalled to mind that the Supreme Court in *Hew Sook Ying v Hiw Tin Hee* emphasised, in clear words, that in a case where the company was the registered proprietor of the land and had sold the land to the appellant and had handed to the appellant the instrument of transfer and the document of title for registration, it was impossible to envisage how the respondent there as the managing director either personally or as a shareholder or as an officer of the company, could be said to have a caveatable claim to title or registrable interest under s 323(1) of the NLC. Likewise here, as a shareholder of the plaintiff, the defendant has no caveatable interest, at all, in the property. Even the settlement agreement does not confer any caveatable interest in the defendant.

[43] Here, other than the fact that the company is in liquidation and the respondent was previously a shareholder and now a contributory, the facts in the present case is identical to that of *Natsafe* as well as to the Supreme Court case of *Hew Sook Ying v Hiw Tin Hee @ Hew Hee* [1992] 2 MLJ 189 (SC), in that the interest in shares can never descend into an interest in the land held by the company in liquidation or otherwise.

[44] In all probability, the respondent, being an experienced litigant and who is familiar with the caveat system, knew very well that a shareholder would not have a caveatable interest in the company's land. It is because of this that the respondent introduced a new idea pertaining to its 'legitimate expectation' as set out in para 7 of the statutory declaration. In my judgment, an expectation no matter how legitimate it may be can never fall within the ambit of s 323(1) of the NLC. In adjudicating encl 1, there is no necessity for me to look beyond the statutory declaration in order to ascertain whether the caveator has made out a sufficient case to prove its caveatable interest. The duty to disclose the relevant facts in order to establish a caveatable interest is rather strict. The caveator cannot simply get away by merely declaring vague notions or some remote equitable claim in the statutory declaration and thereafter hope, against all hope, to justify its equitable claim in their affidavits. The lack of particulars and information in the statutory declaration must surely be held against the caveator. When commenting on the lack of particulars in the statutory declaration in the case of *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 6, I did make the following caustic remark at p 16:

> Is it too much to ask of a caveator?

In *Goh Keng How*, a particular trust deed was not mentioned in the statutory declaration but it was sought to be raised by way of an affidavit and this omission was held against the caveator and he was prevented from improving his case through affidavit evidence. The same impediment should be invoked against the caveator in this case.

[45] The respondent has filed an affidavit in two volumes exhibiting documents, proposed legal suits, affidavits used in previous suits together with the exhibits and all these were shown purportedly to create some kind of equity that the respondent was supposed to have in order to stop the sale of the said lands to the purchaser.

But with respect, encl 1 is not concerned with an injunction. Rather, it is to decide the removal of the private caveats. Perhaps, at this juncture, it would be ideal to read the following two authorities on caveats generally:

(1) *Chia See Yin & Ors v Yeoh Kooi Imm* [1996] 2 MLJ 494; and

(2) *AKB Airconditioning & Electrical Sdn Bhd v Hew Foo Onn & Anor* [2002] 5 MLJ 391.

IS THE COMPANY IN LIQUIDATION DEBT FREE?

[46] In para 8 of the statutory declaration, the deponent has averred that 'no sum is due to any person and is prepared to establish its position'. This averment is probably the most glaring of all lies ever deposed in a statutory declaration. The very fact that the company has been wound up and the estate is plagued with numerous claims from creditors amounting to millions of Ringgit is self explanatory as to the company's insolvency. The statutory declaration has not declared the true state of affairs.

[47] The very fact that the sum of RM30m was offered by one Jayaraman, a director, to settle the estate on or about December 2004 and the fact that the said lands still remain charged to OCBC bank are matters known to the deponent. So, it can readily be surmised that para 8 of the statutory declaration is nothing less than a conscious effort to mislead the land office and to those people who make a search at the land registry.

A QUIA TIMET ORDER RESTRAINING THE RESPONDENT FROM FURTHER CAVEATING THE SAID LANDS

[48] In the originating summons in encl 1, the applicant seeks an order to prevent the respondent from filing further caveats on the said lands. It is an unusual prayer of a pre-emptive nature bearing in mind that in the past the respondent's conduct leaves much to be desired. In the past, the respondent has abused the caveat system much to the chagrin of the applicant.

[49] The stand of the applicant is clear. That private caveats should never be used as an injunctive instrument to frustrate dealings in the said lands. In regard to a quia timet order, reference should be made to *Clerk & Lindsell on Torts* (14th Ed) at p 298 where the learned authors wrote:

> … as a general rule, it is premature for the plaintiff to come to court, before a complete cause of action has accrued, for instance in a case where damage is the gist of the action, before the damage has actually occurred. Nevertheless, the court may in certain cases issue an injunction quia timet to restrain conduct which, if allowed to go forward would almost certainly lead to a substantial damage to the plaintiff. So for example where the member of a trade union had begun to picket the plaintiff's hotel in order to prevent the delivery to it of fuel oil, but had not yet succeeded in interfering in the deliveries to such an extent that the picketing amounted to a nuisance, an injunction to restrain further picketing was issued because there was no doubt that the defendants or some of them, did threaten to interfere with the delivery of oil, if necessary for months, by placing pickets, for the purpose of

A sustaining the embargo. The power to grant a quia timet injunction is undoubted and extends to mandatory as well as prohibitory injunctions, but it is exercised sparingly, and only when probability of damage is very high.

Another text book worth referring to would be this. "The Law of Injunctions" by CM Row, eighth edition and there the learned author wrote at p 1004:

B

> Where there is a practical certainty that a substantial damage is imminent, the plaintiff may apply for an injunction at once, without waiting until it has actually happened (*Boyson v Deane* (1899) ILR 22 Mad 251).

Continuing at p 1005 of the same textbook, the learned author wrote the following C passages:

> Where there is an actual invasion of a right and other circumstances of the case show that the invasion is likely to continue, the proper remedy in such a case, is an injunction. To say that the plaintiff ought to sue for damages every time the right is invaded is to drive him to a multiplicity of suits. It is unnecessary to let in positive evidence to show that the
> D defendant intended to invade the plaintiff's rights in the future also. That is a question that can be determined on the probabilities of the case, the surrounding circumstances, and by the light of the conduct of the defendant in the actual obstruction which he has caused in one year and with reference to the attitude which he adopts. In a suit for an injunction, the court can grant relief by way of damages (*Bal Samrat v Sardarsang Hamabhai* (1911) 13 Bom LR 905; *Kaliandas v Tulsi Das* (1899) ILR 23 Bom 786).
>
> E In granting or withholding an injunction, courts should exercise judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant (*Krishna v Kilanthammal AIR* [1928] Mad 810; *Macneil v Debendranath AIR* [1928] Cal 293).

F **[50]** Now, a letter from Messrs Shook Lin & Bok dated 10 February 2006 as seen in exh 'MR-10' of the applicant's further affidavit in encl 10 has revealed that the respondent and/or the company prior to liquidation has contested the bank's proceedings against them every step of the way. Every order made against them has been appealed. Thereafter they applied for a stay pending the appeal. Once the stay
G was dismissed they appealed against that order and attempted another stay pending that appeal. This prompted the learned judge of the Court of Appeal in the person of Gopal Sri Ram JCA in the case of *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187, to make the following remark (at p 200):

H

> As submitted by counsel for the respondent, this appellant has a history of questioning judgments after they are entered on summonses that are seriously contested. If what the appellant is seeking to do here is not an abuse, I cannot see what is.

It must be borne in mind that the abovenamed case arose out of the following proceedings:

I

(i) an appeal against the winding up order;

(ii) an appeal against the order of the High Court judge declining to stay the winding-up petition on the grounds that there were two other suits in which the appellant sought to impeach the judgment and to set aside the order for sale;

(iii) an appeal against the decision of the High Court judge granting an amendment to the respondent's petition;

(iv) an appeal against the High Court judge's refusal to strike out the petition; and

(v) an appeal against the High Court judge's refusal to order a cross-examination of the deponent who affirmed the respondent's affidavit.

[51] What irked Gopal Sri Ram JCA in that case was that the objections were made piecemeal and in instalments and re-litigating issues which have been decided in other courts. It is germane to note that the respondent herein was one of the appellants there who applied for a stay on the basis of being a contributory. Needless to say that the Court of Appeal in that case dismissed all the appeals.

[52] It is undeniable that the respondent has the right to appeal against an unfavourable decision. But, the respondent seeks to re-litigate on issues which have already been decided by other courts and this is what that irks the applicant and, consequently, prompts the applicant to seek the pre-emptive remedy in encl 1. To illustrate and emphasise this point, one need not look further than to refer to the case of *Anafartalar Caddesi Sdn Bhd (formerly known as Perdana Merchant Bankers Bhd) v Southern Investment Bank Bhd* [2003] 1 MLJ 561, a decision of the Court of Appeal dated 16 December 2002 and the facts of which may be stated as follows. The appellant was a shareholder of Kredin Sdn Bhd which was the registered owner of three pieces of property ('the said lands'). The said lands were purchased by the respondent through a public auction pursuant to an order for sale made by the High Court under s 256 of the NLC. The respondent was then issued with Form 16F, a certificate of sale. Kredin Sdn Bhd was later wound up for failing to settle a debt amounting to more than RM8m. The appellant then entered a caveat against the said lands. Upon the respondent's application, the High Court ordered the removal of the said caveat and also refused the appellant's application for a stay of execution. The appellant appealed to the Court of Appeal against the High Court's decision in ordering the removal of the caveat ('the said appeal'). That hearing was still pending. The appellant then applied to the Court of Appeal under s 44 of the Courts of Judicature Act 1964 for a stay pending the said appeal. The Court of Appeal refused to grant the stay pending the appeal. Abdul Aziz Mohamad J (now JCA) writing for the Court of Appeal had this to say at pp 565–566 of the report:

> Although the hearing before us was not of the appeal against the removal of the caveat, it was clear from the appellants' statement of the nature of their claim that they made in their application for the entry of the private caveat that their claim did not fall under any of the paras (a), (b) and (c) of s 323(1) and that they were not therefore a body at whose instance a private caveat may be entered. In other words, going by their own claim, they had no *locus standi* to have a caveat entered.
>
> Before us, the appellants' counsel sought to base the appellants' *locus standi* on a claim which was different from what they had stated in their caveat application. Apart from such a change of ground not being permissible, as stated by this court in *Goh Paik Swan v Ng Choo Lum @ Ng Poon Lum* [1997] 1 CLJ 77 at p 87b we saw no merit in the argument for the new claim.
>
> The argument had been raised in submission in the High Court on the respondents' application for removal of the caveat. There the appellants did not dispute that the position

in law is that a shareholder of a company has no interest in the assets of the company. But they argued that that is the position of a shareholder where the company is not wound up, but where a company, like Kredin, is wound up, they argued that the position is different and they based their argument on s 264 of the Companies Act 1965, and it was on s 264 that their counsel based their argument before us.

[53] After reproducing s 264 of the Companies Act 1965, Abdul Aziz Mohamed J (now JCA) remarked as follows (see p 565 of the report):

> The argument of the appellants' counsel amounted to this, that by virtue of the fact that in Kredin's liquidation the appellants, as a member of Kredin, would be entitled to a share in the surplus property, if any, of Kredin, the appellants fell under para (a) of s 323(1) of the National Land Code as a 'body claiming title to, or any registrable interest in, (the lands) or any right to such title or interest'. It amounted to saying that after a company whose property includes land has been ordered to be wound up, if there is, after paying off creditors, to be surplus property to which the members of the company are entitled, they have title, or a right to title, to the land and therefore may be registered as the proprietors of the land, or they have an interest, or a right to an interest, in the land that may be registered, and each of them may lodge a private caveat against the land by virtue of para (a) of s 323(1) to prevent any dealing with the land pending the realisation of their claims. We rejected the proposition as an absurdity that would turn the business of winding up of companies topsy turvy.

[54] Likewise here, the respondent is doing exactly the same thing as what they have done before to *Southern Investment Bank Bhd*. Here, the respondent entered those five private caveats in order to frustrate the liquidator's right to sell the said lands belonging to the company in liquidation. The respondent has deposed a statutory declaration as a contributory knowing fully well that the Court of Appeal has dismissed an identical attempt by the respondent on 16 December 2002 (see the decision of Abdul Aziz Mohamed J (now JCA) for the Court of Appeal in *Anafartalar Caddesi Sdn Bhd v Southern Investment Bank Bhd*). It is for this very reason that the applicant herein seeks a quia timet order in order to prevent the respondent herein from further caveating the said lands which will have the effect of eventually frustrating the purchaser of the said lands. It is rather obvious that the ultimate objective of the respondent herein is to delay and prevent the sale of the said lands at all costs.

ARGUMENTS BY THE RESPONDENT IN OPPOSING ENCL 1

[55] Lest I be accused of an oversight, I must now consider the arguments advanced by the respondent in opposing encl 1.

[56] It is argued by the respondent that the applicant has no locus standi to file encl 1 nor the solicitors who filed encl 1 are vested with the authority to do the same.

[57] On locus standi, the respondent submits that the applicant files encl 1 pursuant to s 327 of the NLC which allows for 'any person or body aggrieved by the existence of a private caveat' to apply for its removal. And the fact that the liquidator/applicant has not complied with the provisions of s 233 of the Companies

Act 1965 to vest the property in its name by order of the court deprives the liquidator/applicant of any locus standi to make the application in encl 1. For convenience, s 233 of the Companies Act 1965 is hereby reproduced:

> 233. Custody and vesting of company's property.
>
> (1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
>
> (2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.
>
> (3) Where an order is made under this section every liquidator of a company in relation to which the order is made shall lodge within seven days of the making of the order —
>
> (a) an office copy of the order with the Registrar; and
>
> (b) where the order relates to land, an office copy of the order with the appropriate authority concerned with the registration of dealings in that land,
>
> and every liquidator who makes default in complying with this section shall be guilty of an offence against this Act.
>
> Penalty: Two thousand ringgit. Default penalty.
>
> (4) No vesting order referred to in this section shall have any effect or operation in transferring or otherwise vesting land until an appropriate entry or memorandum thereof is made by or with the appropriate authority.

[58] In short, what the respondent is saying is this. Until the applicant is sanctioned by the vesting order of the winding-up court, the applicant is not a body aggrieved nor is the applicant clothed with the requisite locus standi to make the application in encl 1. The respondent refers to the case of *Eng Mee Yong & Ors v Letchumanan*, particularly to the following passage at p 215 in the judgment of Lord Diplock:

> It is otherwise when the applicant under s 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

and the respondent points out that the titles to the said lands are not in the applicant's name nor are the titles vested in law in the applicant's name and so it becomes incumbent for the applicant to 'satisfy the court that there are sufficient grounds in fact and law for treating the applicant as the body having a claim to an interest in the said lands as would, if it were established, make the applicant aggrieved by the existence of the five private caveats'. The respondent also seeks to emphasise that the applicant in the case of *Nanyang Development (1966) Sdn Bhd v How Swee*

A *Poh* [1970] 1 MLJ 145 was the registered proprietor whereas the applicant here before me is not the registered proprietor of the said lands. For all these reasons, the respondent says that the applicant here is not clothed with the right to deal with the said lands and pursuant to s 327 of the NLC, the application in encl 1 should be dismissed.

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[59] I have said in the early part of this judgment that s 236(2) of the Companies Act 1965 empowers the liquidator like the applicant here to dispose of the property belonging to a company in liquidation and do all things necessary to ensure that this very objective is met. I too have said in the early part of this judgment that s 236(2)(a) of the Companies Act 1965 permits the liquidator like the applicant here C to 'bring or defend any action or other legal proceeding in the name and on behalf of the company'. It must be borne in mind that the applicant as the Official Receiver and Liquidator of the company in liquidation has entered into a sale and purchase agreement with the purchaser for sale of the said lands and the applicant is bound contractually to deliver the said lands to the purchaser free from encumbrances on or D before the completion date of 28 February 2006. That would clothe the applicant with the right to deal with the said lands pursuant to s 327 of the NLC. Since the private caveats entered by the respondent prevents the applicant from fulfilling its contractual obligations, the applicant must be construed as a 'body aggrieved' in order to entitle it to remove the private caveats. In my judgment, the applicant here has the locus standi to file encl 1.

E

[60] Next, it is argued by the respondent that the originating summons in encl 1 is bad in law at its inception. It seems that the solicitors Messrs Shahrizat Rashid & Lee who initiated these proceedings in encl 1 purportedly on behalf of the liquidator have no lawful authority to do so, so submits the respondent. By way of an F elaboration, the respondent submits further along the following lines:

(1) that the general powers of the liquidator are set out in s 236 of the Companies Act 1965;

(2) that s 233(2) of the Companies Act 1965 sets out the specific duties of the G liquidator; and

(3) that a reading of both these two sections, particularly a consistent and harmonious reading of s 236(1)(e) and s 236(2)(a) of the Companies Act 1965 makes it clear that for the liquidator to appoint an advocate to assist him in his duties, he needs the authority of either the winding up court or of the H committee of inspection.

[61] The respondent then proceeds to make the following conclusions:

(a) that the liquidator purported to appoint the advocates and solicitors here without authority of either the winding-up court or the committee of I inspection;

(b) that the liquidator seeks to justify this by relying on a reading of s 236(2)(a) of the Companies Act 1965 that he 'may' to mean that he has the power to bring or defend any action in the name and on behalf of the company in liquidation;

(c) that s 236(1)(e) of the Companies Act 1965 reads that, 'The liquidator may with the authority either of the court or of the committee of inspection appoint an advocate to assist him in his duties';

(d) that s 236(2)(a) of the Companies Act 1965 enacts that, 'The liquidator may bring or defend any action or other legal proceeding in the name and on behalf of the company';

(e) that a plain and simple reading of the whole s 236 of the Companies Act 1965 and not reading parts of the said section in isolation, it is clear that:

(i) the liquidator has the power to bring or defend any action … in the name and on behalf of the company;

(ii) but, if in carrying out this duty to sue or defend any matter in the name and on behalf of the company, the liquidator wishes to appoint an advocate to assist him, the liquidator requires the authority of either the winding-up court or of the committee of inspection;

(iii) that this is the general provision of s 236(2)(a) of the Companies Act 1965 and it must be read with the specific provision of s 236(i)(e) of the Companies Act 1965;

(iv) furthermore, another specific provision of the law is found in s 233(2) of the Companies Act 1965 which reads (the relevant parts) as follows:

> The court may, on the application of the liquidator by order direct that all or any part of the property … belonging to the company … shall vest in the liquidator … and the liquidator may, after giving such indemnity, if any, as the court directs, bring or defend any action or other legal proceeding which relates to the property or which it is necessary to bring or defend for the purpose of effectively winding-up the company and recovering its property.

and according to the respondent there has been a total non-compliance of this provision by the liquidator;

(v) that in interpreting a statutory provision, it must be borne in mind that:

(a) all relevant parts of the statute must be looked at together in its correct perspective and not in total isolation; and that

(b) it must not be forgotten that specific provision overrides the general provision.

[62] Divergent views have been adopted by the High Courts in the following cases:

(1) In *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119, the learned High Court judge held that by virtue of s 236(1)(e) of the Companies Act 1965 counsel who was to represent the liquidator must have the authority of the court or the committee of inspection failing which the counsel would have no locus standi. However, the learned High Court judge also held, after referring to ss 236(2) and 236(3) of the Companies Act

1965, that the actions of the liquidator in bringing the motion was not void but as counsel who brought the proceedings had no authority to do so, the motion was dismissed with costs.

(2) In *Maiko Woods Maritime & Properties Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd* [1998] 4 MLJ 395, the learned High Court judge held that a legal firm which was appointed by the liquidator without complying with s 236(1)(e) of the Companies Act 1965 had no locus standi to act and accordingly struck off the application before him.

(3) In *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 4 MLJ 262, the learned High Court judge held that, inter alia, the power to commence an action under s 236(2) of the Companies Act 1965 must necessarily include the power to appoint an advocate and solicitor for that purpose (following the High Court decision in *Selvam Holdings (Malaysia) Sdn Bhd v Toby Lam (as the Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1995] 1 AMR 139).

[63] The learned counsel for the respondent expresses his views that the decisions by the learned High Court judges in the abovementioned cases did not take into account that the whole of the statutory provisions should be analysed and applied in its correct perspectives and not just taking certain parts of the provisions and interpret it in isolation. According to the learned counsel for the respondent, the statutory canon of interpretation demands that the general rule must give way to the specific. Again, according to the learned counsel for the respondent, the learned High Court judges in the abovementioned cases made no reference to nor consider the implications of s 233(2) of the Companies Act 1965.

[64] The learned counsel for the respondent proceeds to criticise the decision of the learned judicial commissioner in the case of *Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang* [2002] 2 MLJ 439 and he points out that:

(1) the learned judical commissioner fell into the error of interpreting separate parts of the statute in isolation and not together in order to give it a harmonious interpretation; and

(2) the learned judicial commissioner did not appreciate the 'general and specific' principle.

[65] Finally, the learned counsel for the respondent argues that the originating summons in encl 1 that was filed without lawful authority in accordance with the Companies Act 1965 is ultra vires the said Act and is bad in law and should be struck off with costs.

[66] It seems to me that what the respondent is saying is this. That by virtue of section 233 of the Companies Act 1965, the applicant must first vest the said lands in its name by way of an order of the court before the applicant has any locus standi to make the application in encl 1.

[67] By way of an affidavit affirmed on 1 March 2006 as seen in encl 21 at para 15 thereto, the applicant has deposed that it has never been the practice of the Official Receiver and Insolvency office acting as a liquidator to seek any vesting of property which is already registered in the name of the company in liquidation. The affidavit in enclosure 21 further clarifies that the purpose of s 233 of the Companies Act 1965 is that it only applies in situations where the company has a beneficial interest in the property held by a third party, for example, a trustee. That being the case, it is pointed out that it is totally wrong to employ the provision of s 233 of the Companies Act 1965 in order to curtail the unfettered powers provided for under s 236(2) of the Companies Act 1965. It seems to me that the intention of s 233 of the Companies Act 1965 is to impose a statutory duty on the liquidator to 'take into his custody and under his control all the property or choses in action to which the company is or appears to be entitled' (see *Company Law* by Walter CM Woon at p 513). Section 233(2) of the Companies Act 1965 states that the liquidator may even bring or defend any action or legal proceedings for the purposes of effectually winding up the company and recovering its property. This very power to bring or defend legal proceedings must be confined to the objective as set out in s 233(1) of the Companies Act 1965. It is a power to be exercised with the sole intention of taking custody and control of assets held by other parties or third parties but beneficially belonging to the company in liquidation. Thus, it is important to distinguish the two powers of commencing and defending legal proceedings. The powers given to the liquidator under s 236(2)(a) of the Companies Act 1965 is a general power whereas the powers given under s 233(2) of the Companies Act 1965 is for a specific purpose. It is clear as crystal that the very purpose of s 233 of the Companies Act 1965 is to essentially gather all the assets, landed or otherwise, for the purposes of putting them in the hands of the liquidator. Here, the said lands are already registered in the name of the company in liquidation and therefore there is no need to vest the said lands or to put the said lands in the custody and control of the liquidator because it is already in the custody and control of the liquidator. This is the correct interpretation of s 233 of the Companies Act 1965 and it is the same interpretation as adopted by Walter CM Woon in his book entitled *Company Law* at p 513 thereto. There, the learned author said at the same page:

> The court may order any contributory, trustee, receiver, agent or officer of the company to deliver to the company any money, property or documents that he has in his hands.

[68] It is a correct assertion to make that this originating summons in encl 1 is brought by the liquidator in the name and on behalf of the company in liquidation pursuant to s 236(2)(a) of the Companies Act 1965 and it is not an action filed and brought by the liquidator *qua* himself but rather in the name and on behalf of the company. Therefore, in deciding whether or not the liquidator is a party aggrieved under s 327 of the NLC, one must apply the following salient test, namely:

> is the company in liquidation an aggrieved party and not whether the liquidator is himself aggrieved?

A It would follow that, if at all, the liquidator can be aggrieved it can only be aggrieved as the liquidator for and on behalf of the company. So, when the liquidator sells the said lands under the powers given to it under s 236(2)(c) of the Companies Act 1965 he sells it in the interest of the company in liquidation and for the purposes of liquidating the assets of the company. Any caveat which purports to prevent the sale will invariably infringe against the interest of the company in liquidation. Put differently and succinctly, this is an action filed for and on behalf of a company in liquidation and that being the case it is the company in liquidation that would be an aggrieved party under s 327 of the NLC. The liquidator merely exercises his statutory duty and power to commence proceedings under s 236(2)(a) of the Companies Act 1965.

[69] To adopt the respondent's argument pertaining to s 233 of the Companies Act 1965 would simply mean that the applicant must first vest the said lands in its own name before the applicant can be said to have locus standi to make this application in encl 1. With regret, this proposition would run foul of the very statutory provision that clothes the applicant with the requisite locus standi to make this very application in encl 1 and that would be s 236(2)(a) of the Companies Act 1965. In my judgment, s 236 (2)(a) of the Companies Act 1965 does away with any argument that revolves around locus standi. As I see it, s 236(2)(a) of the Companies Act 1965 gives an unqualified power and hence the right to bring or defend an action is unreservedly protected. Effect must surely be given to s 236(2)(a) of the Companies Act 1965 since it is found in the statute book and having statutory force. Incidentally, to proceed further, even the liquidator's right to sell the said lands is also preserved and also unqualified under s 236(2)(c) of the Companies Act 1965. It is now opportune to reproduce verbatim s 236 of the Companies Act 1965. It enacts as follows:

Powers of liquidator

236. (1) The liquidator may with the authority either of the Court or of the committee of inspection —

(a) carry on the business of the company so far as is necessary for the beneficial winding up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding up order;

(b) subject to s 292 pay any class of creditors in full;

(c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the

company, on such terms as are agreed, and make any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

(e) appoint an advocate to assist him in his duties.

The liquidator may —

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit;

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money be deemed due to the liquidator himself;

(i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers.

[70] It is wrong to say that before the liquidator can sell the said lands, the said lands must first vest in the liquidator under s 233 of the Companies Act 1965. It is pointless to have s 236(2) of the Companies Act 1965 as enacted by Parliament if this court cannot give effect to it. The qualified powers of a liquidator are deliberately provided for under s 236(1) of the Companies Act 1965. And I venture

to say, and it is my judgment, that the powers provided for under s 236(2)(a) or s 236(2)(c) of the Companies Act 1965 are not in any way curtailed by s 233 of the same Act.

CONCLUSION

For the varied reasons as adumbrated in this judgment, I grant an order in terms of encl 1 for prayers (a), (b), (c) and (d). This means that encl 7 would come to an end. Enclosure 7 dies a natural death.

Application allowed.

Reported by Loo Lai Mee